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No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR THE PETITIONER

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

An Oregon jury held Philip Morris USA ("Philip Morris") liable for fraud and awarded $79.5 million in punitive damages – 97 times the compensatory damages awarded by the jury. The jury returned this verdict after plaintiff's counsel urged it to impose punishment for all smoking-related harms suffered by Oregonians. On remand from this Court for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court held that the jury could properly punish Philip Morris for harms its conduct may have caused to non-parties. Furthermore, stating that the jury could have found that Philip Morris's conduct was "extraordinarily reprehensible" and that the conduct could have come within the statutory definition of manslaughter, the Oregon Supreme Court held that those two factors "provide[d] a basis for overriding" the constitutional requirement of a reasonable relationship between punitive and compensatory damages. The questions presented are:

1. Whether the Oregon courts deprived Philip Morris of due process by permitting the jury to punish Philip Morris for harms to non-parties.

2. Whether, in considering a claim that a punitive award is unconstitutionally excessive, a court may disregard the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm whenever it concludes that (i) the jury could have found the defendant's conduct to be highly reprehensible and (ii) the conduct could come within the statutory definition of a crime.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of Philip Morris USA's stock.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Oregon Supreme Court (Pet. App. 1a-34a) is reported at 127 P.3d 1165. The decision of the Oregon Court of Appeals on remand from this Court (Pet. App. 35a-75a) is reported at 92 P.3d 126.

JURISDICTION

The decision of the Oregon Supreme Court was issued on February 2, 2006. The petition for a writ of certiorari was filed on March 30, 2006, and granted on May 30, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

A. Jesse Williams.

Jesse Williams started smoking in or about 1950, as a 21-year-old soldier serving in Korea, because fellow GIs told him that the smoke would keep mosquitoes away. J.A. 56a, 126a-127a, 130a. After his military service Williams settled in Portland, Oregon, where he spent the rest of his life. *Id. at* 128a-131a. He started smoking Marlboro cigarettes, which are manufactured by Philip Morris, in about 1955. *Id.* at 47a-48a. Williams smoked an average of two packs of cigarettes per day for 45 years. *Id.* at 34a, 133a, 155a.

Williams had been taught as a child that smoking was unhealthy, and he and his wife, in turn, admonished their children not to smoke. J.A. 140a, 151a-152a, 181a-182a. Citing the dangers of smoking, Williams's wife, children, and physician repeatedly urged him to quit. *Id.* at 124a, 131a-132a, 146a-148a, 154a. But Williams did not like to be reminded about the risks of smoking. *Id.* at 131a-132a, 133-134a. According to his wife, Williams said that "'the tobacco companies[] don't even say they're cancer sticks, so I can smoke them.'" *Id.* at 153a. His wife frequently pointed

to the warning labels on cigarette packages and told him that cigarettes would kill him. Williams would respond: "Phooey. * * * This is what the Surgeon General says, it's not what [the] tobacco company says." *Id.* at 133a. According to his wife, Williams gave no credence to the Surgeon General's warnings because he believed that the tobacco companies would not sell a harmful product. *Id.* at 131a-133a. She explained that "he would say 'Well, honey, you see I told you * * * cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!'" *Id.* at 138a.

In October 1996, Williams was diagnosed with inoperable lung cancer. *Id.* at 127a, 150a-151a. According to his wife, he responded to the diagnosis by saying "'those darn cigarette people finally did it. They were lying all the time.'" *Id.* at 149a. Williams died in March 1997.

B. Trial And Verdict.

Williams's widow ("plaintiff") sued Philip Morris. She alleged that the company had falsely represented that the link between cigarettes and cancer had not been scientifically established and that those representations caused Williams to continue smoking. Plaintiff also claimed that the company was negligent in (1) selling cigarettes that it knew or should have known were addictive and caused cancer; (2) manipulating the contents of cigarettes in order to maintain and enhance their addictive effects; (3) failing to test cigarettes in ways likely to link smoking with human disease; and (4) failing to make a safer cigarette.

Plaintiff's trial evidence covered topics ranging from Philip Morris's research practices to its litigation positions, but her principal theory was that Philip Morris had engaged in a decades-long campaign to persuade the public that smoking does not cause cancer. In support of this theory, plaintiff introduced into evidence a sum total of 14 public statements about the causal link between smoking and cancer that were

attributable to Philip Morris. It was undisputed that only seven of those statements ever appeared in the popular media, and there was no evidence that Jesse Williams read, heard, or was aware of *any* of the 14 statements.[1]

Both plaintiff and the Oregon Court of Appeals acknowledged the lack of evidence that Williams had ever seen or heard any statement attributable to Philip Morris. Pet. App. 37a, 41a. As the trial court observed, the absence of proof of reliance on "a particular misrepresentation directly associated with Philip Morris" made plaintiff's claim "something new" (J.A. 158a), adding: "We haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one." *Ibid.* The court nevertheless sent the claim to the jury.

In both his primary and his rebuttal closing arguments, plaintiff's counsel repeatedly urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the smoking-related harms allegedly suffered by other Oregonians who were not identified and whose circumstances were never presented to the jury. For example, in closing argument he urged:

> When you determine the amount of money to award in punitive damages against Philip Morris * * * [i]t's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon

---

[1] Philip Morris introduced undisputed evidence of widespread awareness of the risks of smoking from at least the 1950s onward. J.A. 166a-169a. In 1964, the Surgeon General issued his landmark Report linking cigarettes to lung cancer. *Id.* at 172a. That Report was front-page news in newspapers across the nation – including *The Oregonian*. *Id.* at 17a, 175a. Shortly thereafter, Congress passed legislation requiring every cigarette package sold in the United States after January 1966 to display a prominent health warning. *Id.* at 276a-278a.

> there have been. It's more than fair to think about how many more are out there in the future.
>
> * * *
>
> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third * * *.

J.A. 197a, 199a.

In order to reduce the risk that the jury would punish it for harms allegedly suffered by non-parties, Philip Morris requested the following jury instruction:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Pet. App. 17a-18a. The trial court refused to give this instruction, choosing instead to tell the jury that it was free to award any amount of punitive damages up to $100 million. J.A. 284a. The jury was not told the reason why the punitive damages were limited to $100 million: it was the amount arbitrarily requested in plaintiff's complaint. Pet. App. 9a.

The jury found for plaintiff on both her fraud and product design claims and awarded $821,485 in compensatory dam-

ages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud, while declining to impose punitive damages on respondent's other claims, including defective design.

On post-trial motions, the trial court found the punitive award "excessive under federal standards" and reduced the punitive damages to $32 million – still 39 times the jury's compensatory award. J.A. 307a-308a.

C. Appeal And GVR.

On appeal, the Oregon Court of Appeals rejected Philip Morris's contention that the trial court should have given the "harm to non-parties" instruction, concluding that the proposed instruction misstated the applicable law. *Williams* v. *Philip Morris Inc.*, 48 P.3d 824 (Or. Ct. App. 2002). It further held that the jury's $79.5 million punitive damages verdict was not excessive and reinstated it. *Id.* at 843.

After the Oregon Supreme Court denied review, Philip Morris petitioned this Court for a writ of certiorari, raising both the "punishment for harm to others" issue and an excessiveness claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). *Philip Morris USA Inc.* v. *Williams*, 540 U.S. 801 (2003).

D. Proceedings On Remand.

On remand, the Oregon Court of Appeals again rejected Philip Morris's claims of instructional error, expressly holding that it was appropriate for the jury to punish for harms to non-parties. Pet. App. 75a. The court also adhered to its prior ruling that the award was not excessive, relying primarily on unproven harms to non-parties to justify the massive award.

The Oregon Supreme Court affirmed. According to that court, the jury could have found that Philip Morris had "deceived other smokers in Oregon" besides Jesse Williams and that Philip Morris's products "caused a significant number of deaths each year in Oregon during the pertinent time period * * *." Pet. App. 7a-8a. Although plaintiff proffered no evidence purporting to show that any Oregon smoker other than Williams sustained injuries in reliance on any alleged misrepresentations (as distinct from injuries due simply to smoking), the court held that widespread reliance and injury could be inferred. *Id.* at 8a n.1.

The Oregon Supreme Court then addressed Philip Morris's contention that the jury should have been instructed not to punish for harms allegedly suffered by non-parties. The court rejected the argument "that [*State Farm*] prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to non-parties." *Id.* at 18a. It concluded that the restriction articulated in *State Farm* applies only when the harm to non-parties arises from conduct that is not similar to that which injured the plaintiff. *Id.* at 19a-20a.

The Oregon Supreme Court went on to consider the three "guideposts" announced in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) legislatively established penalties for comparable conduct.

Taking the evidence in the "light most favorable to the plaintiff," the court stated that the record would have permitted a jury finding that Philip Morris's conduct was "extraordinarily reprehensible." Pet. App. 23a. As the court interpreted the evidence, the jury could have found that Philip Morris's misconduct affected "a broader class of Oregonians" who kept purchasing cigarettes and therefore be-

came ill or died. *Ibid.* Thus, the court concluded, "the first *Gore* guidepost favors a very significant punitive damage award." *Id.* at 24a.

The court held that the third *BMW* guidepost – the legislatively established penalties for comparable misconduct – also supported a large punitive award: "Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter." Pet. App. 27a. The court noted that the fine for a corporation convicted of manslaughter at that time was $50,000. *Id.* at 28a-29a.

The court recognized that "the second *Gore* guidepost is not met" (Pet. App. 31a), but upheld the award anyway. It acknowledged that, because the punitive award is 97 times the jury's compensatory award and 152 times the capped award, "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [U.S. Supreme] Court has said ordinarily will apply in the usual case." *Ibid.* Nevertheless, the court said, "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

SUMMARY OF ARGUMENT

I.

Only three years ago, this Court held that a defendant cannot be punished in an individual action for harms to persons other than the plaintiff. "Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct," which violates due process. *State Farm*, 538 U.S. at 423. The Oregon Supreme Court nevertheless held such punishment to be permissible, so long as the non-party harms arose from conduct similar to that which injured the plaintiff. On that basis, the court affirmed the trial

court's denial of Philip Morris's requested jury instruction, which would have informed the jury that it could not punish for harms to non-parties.

The Oregon courts' resolution of this issue is impossible to square with *State Farm* or this Court's other precedents. The practice of allowing a jury in an individual case to punish for harms to non-parties virtually ensures the arbitrary deprivation of property against which the Due Process Clause protects. Under the Oregon regime, an individual plaintiff is not bound by the results of another individual's suit. Accordingly, any defendant that is sued repeatedly for injuries allegedly arising from a single course of conduct is in danger of being punished repeatedly for the same harms. This is so even if, like Philip Morris, it wins most of the cases brought against it on the same legal theories. Furthermore, given that these non-parties are not identified and their individual circumstances are not presented in court, there is simply no practical way for a defendant to respond to allegations of widespread harm by demonstrating that most or all of the non-parties do not have a valid claim.

Unsurprisingly, there is no historical precedent for permitting collective punishment in an individual action. To the contrary, courts have historically stood steadfast against imposing punitive damages for injuries sustained by non-parties, recognizing – as has this Court – that allowing such punishment would create an unfair risk of duplicative and excessive punishment. In this case, where the jury awarded $79.5 million to an individual plaintiff based on the defendant's conduct toward non-parties, a new trial is the only adequate remedy.

II.

The Oregon Supreme Court also violated due process and deviated from this Court's precedents in holding that any constitutional concern arising from the disproportionate 97:1 ratio of punitive to compensatory damages was "over-

rid[den]" by the possibility that the jury found Philip Morris to have engaged in "extraordinarily reprehensible" conduct that met the statutory definition of manslaughter. Pet. App. 33a. Under this Court's jurisprudence, none of the three *BMW* guideposts can trump the others. Instead, each of the three has a distinct role to play in ensuring that there are "reasonable constraints" on the amount of punitive damages that may be exacted from a defendant.

The constraining functions of the reasonable-relationship requirement are different from those performed by the other two guideposts in critical respects. The ratio guidepost, unlike the reprehensibility guidepost, provides an objective measure of excessiveness. It also helps to protect against punishment for harms to non-parties and limits the effect of an aberrational verdict by requiring that the punitive damages be proportionate to the harm to the plaintiff. Although the ratio guidepost may not be *sufficient* to ensure against arbitrary punishment, it is a *necessary* safeguard. The other two guideposts are insufficient to provide the necessary protection against duplicative and excessive punishment.

That the Oregon Supreme Court erred in upholding a 97:1 ratio of punitive to compensatory damages should be clear. It remains to determine what ratio would be within constitutional bounds. We submit that under long-established practice and this Court's precedents, when the compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages. Where in that range the maximum falls depends upon such factors as the degree of reprehensibility and the extent to which the State's interest in deterrence and punishment may be accomplished through means other than punitive damages. Taking these factors into account, the maximum in this case is "at or near the amount of compensatory damages" (*State Farm*, 538 U.S. at 429), and certainly no greater than four times the compensatory award.

ARGUMENT

I. THE OREGON COURTS DEPRIVED PHILIP MORRIS OF DUE PROCESS BY ALLOWING THE JURY TO IMPOSE PUNISHMENT FOR HARMS SUFFERED BY NON-PARTIES.

This Court has squarely held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. That is because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Ibid.* The Oregon courts' violation of this principle requires a new trial.

A. Due Process Precludes Punishment For Injuries Suffered By Persons Not Before The Court.

The Fourteenth Amendment bars States from depriving "any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. It is well settled that a "decision to punish a tortfeasor by means of an exaction of exemplary damages" constitutes a "deprivation[] of * * * property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 434-35 (1994). Accordingly, basic principles of procedural due process require States to employ such safeguards as are "necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Id.* at 420. This requirement is not limited to the jury's assessment of punitive liability; it also extends to the determination of the *amount* of damages to be imposed. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20 (1991) (State must employ procedures that produce a "meaningful individualized assessment of appropriate deterrence and retribution"); *Oberg*, 512 U.S. at 432 (procedural due process requires review of "the amount awarded").

Oregon has violated this constitutional command by embracing a procedure under which a defendant can be punished for harms to unidentified individuals who are not before the court (i) without any realistic opportunity to show that those unidentified non-parties might not have valid claims; (ii) without any protection against the filing of identical future claims for punitive damages by those unidentified non-parties; and (iii) with no consideration for cases the defendant may have won (or may win in the future) against those unidentified non-parties.

Thus, Oregon has embraced a procedure that affirmatively promotes excessive, duplicative punishment: a defendant may be punished multiple times for the harms that it allegedly imposed on hundreds or thousands of State residents, without regard to whether it could successfully defend against the claims of some or most of those residents. This procedure is a recipe for precisely the arbitrary deprivation of property against which the Due Process Clause is meant to protect.

1. A procedure that allows juries in individual cases to impose punishment for non-party harms does not adequately guard against, but rather invites, arbitrary deprivations of property.

Oregon's approach is fundamentally unfair in multiple respects. First, as this Court recognized in *State Farm*, the Oregon approach creates a substantial risk of "multiple punitive damages awards for the same conduct." 538 U.S. at 423. The judgment in this case will bind only plaintiff. Therefore, other Oregonians remain free to sue Philip Morris for smoking-related injuries, and to seek punitive damages for their injuries, even though the punitive award in this case may already punish for those harms. Insofar as any of those plaintiffs succeed, Philip Morris will be punished repeatedly for causing exactly the same injuries to exactly the same people.

Such an outcome is plainly unconstitutional. As this Court explained decades ago, an owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again * * * in a suit brought by a claimant who is not bound by the first judgment." *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961). The problem presented by repeated claims for money damages for the same injuries is no different. See *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (describing "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause"); see also *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (invoking *State Farm* and making the same point in the punitive damages context).

Second, because the judgment in an individual case like this one is not binding on any potential claimant except the plaintiff, the Oregon approach exposes defendants to the risk that sooner or later they will be held liable for at least one aggregate punishment, no matter how many times they may have prevailed in similar cases. This regime fails to account for the possibility that, in these similar cases, other juries and courts might not find the defendant's conduct wrongful or might not find that it proximately caused the plaintiff's injury. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003). As the California Supreme Court recently put it in refusing to allow punishment for harms to non-parties, forcing defendants to play this high-stakes game of Russian roulette "present[s] a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005).

This problem is hardly hypothetical. Many Oregonians with smoking-related illnesses could not have proven a claim

for compensation, much less for punishment, had they brought their own suits. Indeed, in the more than 50-year history of smoking-and-health litigation, only two individual cases have ever gone to trial in Oregon:[2] the other claims were either voluntarily withdrawn, not pursued, or dismissed during motion practice. Nor is the small number of lawsuits in Oregon surprising. It is, after all, not unlawful to sell cigarettes, notwithstanding the known dangers; and people who smoke with awareness of the risks have no viable fraud claim. In part for this reason, Philip Morris has prevailed in a significant majority of the individual smoking-and-health cases that have ever gone to trial – including many cases that were brought on the same fraud theory presented by plaintiff here.[3]

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[2] The other case is *Estate of Schwarz* v. *Philip Morris, Inc.*, Case No. 0002 01376 (Or. Cir. Ct. Mar. 22, 2002).

[3] See, *e.g.*, *Karney* v. *Philip Morris Inc.*, Case No. 89196-8 (Tenn. Cir. Ct. May 10, 1999); *Hyde* v. *Philip Morris Inc.*, Case No. 97-359-ML (D.R.I. Mar. 21, 2001); *Carter* v. *Philip Morris Corp.*, Case No. 004567 (Pa. C.P. Jan. 27, 2003); *Lucier* v. *Philip Morris USA Inc.*, Case No. 312610 (Cal. Super. Ct. Feb. 7, 2003); *McDaniel* v. *Brown & Williamson Tobacco Corp.*, Case No. 90832T-8 (Tenn. Cir. Ct. May 10, 1999); *Butler* v. *Philip Morris Cos.*, Case No. 94-5-53 (Miss. Cir. Ct. June 2, 1999); *Reller* v. *Philip Morris USA Inc.*, Case No. BC261796 (Cal. Super. Ct. July 31, 2003); *Longden* v. *Philip Morris Inc.*, No. 2000-C-442 (N.H. Super. Ct. Nov. 24, 2003); *Reller* v. *Philip Morris USA Inc.*, BC261796 (Cal. Super. Ct. Mar. 4, 2005); *Coolidge* v. *Philip Morris Inc.*, No. RIC-361063 (Cal. Super. Ct. Apr. 21, 2005); *Beckum* v. *Philip Morris USA Inc.*, No. 02-01836-Div. D (Fla. Cir. Ct. Apr. 29, 2005); *Mehlman* v. *Philip Morris Inc.*, L-Case No. 1141-99(MT) (N.J. Super. Ct. May 16, 2001). Other tobacco companies likewise often prevail against similar claims. See *Anderson* v. *Fortune Brands Inc.*, Case No. 42821/97 (N.Y. Sup. Ct. June 27, 2000); *Apostolou* v. *American Tobacco Co.*, Case No. 34734/00 (N.Y. Sup. Ct. Jan. 16, 2001); *Tompkin* v. *Brown & Williamson Tobacco Corp.*, Civil Action No. 5:94 CV 1302 (N.D. Ohio Oct. 5,

Third, and relatedly, the Oregon approach cannot be squared with the basic due process right, recognized repeatedly by this Court, to "'an opportunity to present every available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); see also *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"); cf. *Holmes* v. *South Carolina*, 126 S. Ct. 1727, 1731 (2006) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense") (internal quotation marks omitted). An essential component of this due process requirement is that a defendant have the opportunity to present its defenses and to cross-examine adverse witnesses. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"). A defendant might well have winning defenses against parties who are not before the court.[4] However, because those parties are not a part of the case, and often, as here, are not even identified, there is no meaningful opportu-

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2001); *Tune* v. *Brown & Williamson Tobacco Corp.*, Case No. 97-4678-CI-13 (Fla. Cir. Ct. May 24, 2002); *Conley* v. *R.J. Reynolds Tobacco Co.*, C-00-1740 SBA (N.D. Cal. Dec. 31, 2002); *Inzerilla* v. *American Tobacco Co.*, Case No. 011754/96 (N.Y. Sup. Ct. Feb. 20, 2003); *Allen* v. *R.J. Reynolds Tobacco Co.*, Case No. 01-4319-CIV-KING (S.D. Fla. Feb. 28, 2003); *Welch* v. *Brown & Williamson Tobacco Corp.*, Case No. 00-CV-209292 (Mo. Cir. Ct. June 17, 2003).

[4] In smoking-and-health litigation, for example, Philip Morris successfully defends itself on a number of grounds, including lack of reliance; failure to prove proximate causation; the applicable statute of limitations; comparative fault; preemption; and assumption of the risk.

nity to demonstrate, through cross-examination or otherwise, that they lack valid claims.

In this case, plaintiff's counsel introduced evidence of a handful of allegedly false public statements made by Philip Morris over a 46-year period. He then urged the jury to punish Philip Morris for harms to all Oregonians who may have developed lung cancer as a result of smoking its cigarettes – without identifying any of those people, much less offering evidence that they were affected by any fraud. See pp. 3-4, *supra*.

The Oregon Supreme Court basically accepted plaintiff's argument, holding that Philip Morris could properly be punished for injuries to the "broad[] class" of Oregonians who "kept buying cigarettes." Pet. App. 23a. There was no evidence, however, of (i) who these other Oregonians were; (ii) how many (if any) of them heard, relied on, and were injured by the allegedly fraudulent statements that Williams may have heard; or indeed (iii) how many of them had heard, relied on, and were injured by *any* alleged misrepresentations made by Philip Morris.

In other words, plaintiff was allowed to "portray[] [other Oregon smokers] as a large, unified group that suffered a uniform, collective injury," while Philip Morris was "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.). That would never be permitted in a valid class action in which the defendant's due process rights are safeguarded;[5]

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[5] See, *e.g.*, *Broussard*, 155 F.3d at 345; *Rollins, Inc.* v. *Butland*, __ So. 2d __, 2006 WL 1791705, at *10 (Fla. Dist. Ct. App. June 30, 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump

it is even more improper here, where no class was or could have been certified.[6]

Finally, as we discuss below, it is well established that punitive damages must "bear a 'reasonable relationship' to compensatory damages" (*BMW*, 517 U.S. at 580). But plaintiffs in individual cases are not required to (i) prove the validity of anyone's claim other than their own or (ii) introduce evidence of the extent of the harm suffered by anyone other than themselves. Here, for example, there is no way to know

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the class action defendant's right to due process of law."); *Southwestern Ref. Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (because defendant is constitutionally "entitled to challenge the credibility of and its responsibility for each personal injury claim individually," certification of class of plaintiffs alleging personal injury arising out of refinery fire was improper).

[6] Virtually all courts that have addressed the issue have held that smoking-and-health cases cannot properly be certified as class actions because, among other reasons, the claims are highly individualized and the cases cannot satisfy the "predominance" and "superiority" requirements imposed by most jurisdictions. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Estate of Mahoney* v. *R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo* v. *American Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001); *Chamberlain* v. *American Tobacco Co.*, 70 F. Supp. 2d 788 (N.D. Ohio 1997); *Clay* v. *American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Insolia* v. *Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998); *Emig* v. *American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Barreras Ruiz* v. *American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Philip Morris, Inc.* v. *Angeletti*, 752 A.2d 200 (Md. 2000); *Small* v. *Lorillard Tobacco Co.*, 679 N.Y.S.2d 593 (N.Y. App. Div. 1998), aff'd, 720 N.E.2d 892 (N.Y. 1999); *Smith* v. *Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997). Certification of punitive damages classes in such cases also presents due process problems. See, *e.g.*, *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005).

whether anyone other than Jesse Williams was deceived into continuing smoking and, if there were any such people, who among them contracted cancer or some other illness as a result. Accordingly, there is no way to know whether the $79.5 million penalty is excessive punishment for harms to similarly situated Oregonians. Nor is there any way to know in subsequent cases how many non-parties this punitive award was intended to punish for, who those non-parties are, and the cause and extent of their harms. Yet without that information, it is impossible to determine whether subsequent punitive awards are cumulative and hence per se excessive.

In sum, the procedure endorsed by the Oregon Supreme Court is a formula for arbitrary deprivations of property.

2. Historically, punitive damages have been limited to the plaintiff's harm.

Not only does punishment for harms to non-parties lead to serious and irremediable fairness problems, but it also lacks any historical pedigree. For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim. Under this Court's precedents, Oregon's dramatic "departure from traditional procedures" (*Oberg*, 512 U.S. at 421) "raises a presumption that [Oregon's] procedures violate the Due Process Clause." *Id.* at 430.

Punitive damages first appeared in English common law in the 18th century. At that time, there was no clear line between compensatory and punitive damages. See *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116 (1927) ("The distinction between punitive and compensatory damages is a modern refinement."). The concept of punitive or exemplary damages was initially used as a means of explaining and justifying damages awards that were in excess of a plaintiff's tangible harm. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 438 n.11 (2001).

Throughout the second half of the 19th century, courts and commentators were sharply divided over whether damages could ever properly be imposed for purposes of punishment. See *Haslip*, 499 U.S. at 25-27 (Scalia, J., concurring). *Compare* Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE 240-50 (16th ed. 1899) (exemplary damages represent compensation for intangible or dignitary harm) and *Fay* v. *Parker*, 53 N.H. 342, 1872 WL 4394, at *40 (1872) (same) *with* Theodore Sedgwick, TREATISE ON THE MEASURE OF DAMAGES 36 (3d ed. 1858) (punitive damages "blend[] together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender").

Courts gradually began to accept that damages could be imposed to punish as well as compensate. As modern punitive damages law continued to evolve, however, the "notion[] of punishing * * * remained centered throughout on the insult or injury to the plaintiff." Colby, *supra*, 87 MINN. L. REV. at 619. A single act could, of course, harm more than one person, but courts recognized that the punishment in a given suit was for the distinct harm to the party before the court. See, *e.g.*, *Stevenson* v. *Belknap*, 6 Iowa 97, 1858 WL 120 (1858), at *3 (In calculating exemplary damages for a wrong that has harmed more than one party, "proof will be confined, in each case, to the damages resulting to the plaintiff alone, and not to another; nor to the plaintiff jointly with another."); see also Colby, *supra*, 87 MINN. L. REV. at 623 (explaining that, when a defendant's conduct injured more than one person, courts allowed the defendant to be punished more than once "because each award serve[d] as punishment only for the legal wrong that [was] actually before the court – the wrong done to the individual plaintiff").

On the rare occasions when they confronted the problem of punishing for harms to non-parties, 19th-century courts consistently rejected the idea that punitive damages could be used to vindicate the injuries of persons who were not parties

to the particular case. As early as 1874, the Michigan Supreme Court declared:

> The foundation of exemplary damages * * * rests on the wrong done willfully to the complaining party, and not to wrong done without reference to that party. Otherwise, every one entitled under the statute to bring an action might bring his or her separate action for the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in every one of those actions.

Ganssly v. *Perkins*, 30 Mich. 492, 1874 WL 6449, at * 2 (1874).[7]

The general consensus that punitive damages may be imposed only to punish for the harm to the party before the court is reflected as well in the debate among 19th-century courts as to whether punitive damages violate the Double Jeopardy Clause. Several courts held that civil punitive damages could not be imposed where the defendant might be subject to criminal liability for the same act, because a contrary rule would violate the principle "that each violation of the law should be certainly followed by one appropriate punishment and no more." *Taber* v. *Hutson*, 5 Ind. 322, 1854 WL 3361, at *2 (1854); see also Sedgwick, TREATISE ON THE MEASURE OF DAMAGES, *supra*, at 478 n.2. By contrast, courts allowing both civil and criminal punishments did so on the ground that civil punitive damages punish for harm to the individual before the court and not for societal harm, which is vindicated through the criminal justice system. See, *e.g.*, *Chiles* v. *Drake*, 2 Met. 146, 1859 WL 5567, at * 5 (Ky. 1859).

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[7] We direct the Court to the *amicus curiae* brief filed by the American Tort Reform Association for additional examples.

Ultimately, the latter view – that punitive damages do not run afoul of the Double Jeopardy Clause – prevailed.[8] But what is important for present purposes is the common ground in this debate: both sides rejected any notion that multiple punitive awards could be imposed for the same harms to the *same* parties – which is the inevitable result of allowing punishment for harm to parties who are not before the court and hence are not bound by the court's judgment.

Once the double jeopardy question had been settled, issues regarding the propriety of punishing for harms to nonparties did not arise regularly until the late 1960s, with the advent of mass tort litigation. As Judge Friendly observed – in one of the first decisions to consider the "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" (John C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986)) – punitive damages historically had arisen in intentional tort cases, in which "usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967).

As a result of mass tort litigation, however, "punitive damages may [now] be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation." Jeffries, *supra*, 72 VA. L. REV. at 139, 141-43. And as *State Farm* and this case reflect, plaintiffs' lawyers increasingly have exhorted juries in such cases to punish the defendant for the harms suffered by everyone purportedly injured by the defendant's conduct, not just the plaintiff. As the foregoing discussion confirms, this constitutes a marked de-

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[8] See, *e.g.*, *Fry* v. *Bennett*, 1 Abb. Pr. 289, 1855 WL 6398, at *12-*13 (N.Y. Sup. 1855) (Hoffman, J., concurring); *Baldwin* v. *Fries*, 46 Mo. App. 288, 296, 1891 WL 1541 (1891); *Brown* v. *Swineford*, 44 Wis. 282, 1878 WL 3236, at *3 (1878).

parture from historical practice, and thus raises a presumption of unconstitutionality. *Oberg*, 512 U.S. at 430.

B. The Oregon Supreme Court's Rationales For Allowing Punishment For Harms To Non-Parties Are Unsound.

The Oregon Supreme Court offered two principal reasons for rejecting Philip Morris's contention that a jury in an individual case may not constitutionally punish a defendant for harms suffered by non-parties. First, the court opined that *State Farm*'s condemnation of punishment for harm to non-parties was limited to harm arising from *dissimilar* conduct. Pet. App. 19a-20a. Second, the Oregon court found it "unclear" "how a jury could 'consider' harms to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 18a n.3. Neither rationale is valid.

1. This Court has already foreclosed the Oregon Supreme Court's first rationale. The paragraph in *State Farm* to which the Oregon court referred mentions the impropriety of punishing for dissimilar conduct, but then goes on to hold that punishing for harm to non-parties impermissibly "creates the possibility of multiple punitive damages awards *for the same conduct*." 538 U.S. at 423 (emphasis added). The emphasized words should be the end of the matter. But beyond that, the fairness problems identified by the Court – as well as those we describe above, such as the risk of punishment for harms to persons who lack valid claims against the defendant – apply equally whether the alleged non-party harms arise from similar or dissimilar conduct.

2. As for the Oregon Supreme Court's confusion as to how a jury may consider harms to non-parties for purposes of assessing reprehensibility without imposing punishment on that basis, this Court has already drawn that distinction in the context of harms to non-parties who happen to live outside

the forum state. In *BMW*, the Court explained that, although the jury could not "use the number of sales in other States as a multiplier in computing the amount of its punitive sanction," the "evidence describing out-of-state transactions * * * may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574 n.21. That observation applies equally here.

The same distinction also has long been recognized in criminal sentencing: a criminal defendant's entire course of conduct may be relevant in determining where, within a permissible range of potential sentences, the penalty for the particular conviction should fall. Thus, evidence of harm to others may be relevant and admissible to show the reprehensibility of the specific conduct at issue, and may support a higher penalty within a confined range, but the defendant cannot be *punished* for anything other than the offense of conviction. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 154 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction").[9]

Of course, it may sometimes be difficult to tell in retrospect whether a jury impermissibly punished a defendant for harms to non-parties rather than merely taking those harms into account in gauging the reprehensibility of the defendant's conduct toward the plaintiff. No such difficulty exists here, however, given that (i) plaintiff's counsel expressly exhorted the jury to punish for smoking-related harms suffered

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[9] See also *Witte* v. *United States*, 515 U.S. 389, 401-03 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment * * *.") (emphasis in original).

by other Oregonians; (ii) the court refused Philip Morris's proposed jury instruction on this issue; and (iii) the jury responded by returning a verdict of nearly 100 times the compensatory damages. In any event, to the extent that this distinction is one that might be elusive to a jury, that is a reason to give a clearly-worded limiting instruction – not a reason to ignore the constitutional requirement.

C. Philip Morris Had A Due Process Right To An Instruction Prohibiting Punishment For Harms To Non-Parties, Or Some Equivalent Protection.

If a jury in an individual case may not constitutionally punish for harms to non-parties, it follows that the Due Process Clause entitled Philip Morris to an instruction informing the jury of that limitation on its powers. Indeed, an instruction was especially necessary here because plaintiff's counsel expressly urged the jury to punish for harms to non-parties. See pp. 3-4, *supra*.

State Farm effectively decides this point, recognizing that a limiting instruction is required to protect a defendant from a due process violation closely akin to the one involved here. Specifically, after observing that evidence of lawful out-of-state conduct may be relevant to "the deliberateness and culpability of the defendant's action in the State where it is tortious," the Court admonished that "[a] jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 538 U.S. at 422. The instruction at issue here is indistinguishable in all material respects from the one this Court required in *State Farm*.

Moreover, for more than a century, courts have given a limiting instruction of this sort to protect parties against the prejudicial impact of evidence that is admissible for one purpose but inadmissible for another. In the first edition of his evidence treatise, for example, Wigmore declared it "uniformly conceded" that a party against whom evidence was

admissible only for a limited purpose had a right to a limiting instruction so that the evidence would not be misused by the jury. 1A John H. Wigmore, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 13, at 42 (1904). This Court, too, long ago recognized the limiting instruction as an essential safeguard. See, *e.g.*, *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U.S. 161, 166 (1885) (limiting instruction necessary if otherwise inadmissible testimony is permitted for impeachment purposes).

The giving of a simple limiting instruction, a routine feature of jury trials across the nation, would have imposed no burden on the Oregon courts, would have trenched upon no right of the plaintiff, and would have dramatically reduced the risk of an erroneous deprivation of property in this case. Plaintiff had no valid interest in resisting it.[10]

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[10] The instruction requested by Philip Morris would have informed the jury both that it could not punish Philip Morris for harms to non-parties and that its punitive award had to be reasonably related to plaintiff's compensatory damages. As we explain below (at 28-29), a central function of the reasonable-relationship requirement is to constrain the jury's ability to punish for harm to non-parties.

Moreover, plaintiff's counsel took advantage of the absence of such an instruction by telling the jury that the only two relevant figures were (i) the $100 million that the trial court had identified as the maximum permissible award and (ii) Philip Morris's net worth:

> In terms of what $100 million, which is the ceiling above, which you cannot go in this case, bears as a ratio to the net worth of Philip Morris is a dime to a figure of $17. Or one-tenth of a dollar to $17.
>
> That is the ratio of the punitive damage claim in this case.

J.A.198a. The refusal to instruct the jury about the reasonable-relationship requirement was thus highly prejudicial.

There can be little doubt that the refusal to give this critical instruction was highly prejudicial: plaintiff was permitted to argue for a punitive award that punished for harms suffered by other Oregonians, and the jury responded with a penalty of nearly 100 times plaintiff's compensatory damages. A new trial is the only adequate remedy.[11]

II. THE $79.5 MILLION PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

A. The Oregon Supreme Court Erred In Holding That The Ratio Guidepost Can Be "Overridden" By The Other Two Guideposts.

1. The *BMW* guideposts protect against arbitrary deprivations of property.

It is by now well established that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416.[12] This protection is

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[11] Remittitur would be a wholly inadequate remedy for the due process violation that occurred here. In Oregon, as in most jurisdictions, excessive awards are remitted only to the *greatest* amount a jury could lawfully have awarded. *Parrott* v. *Carr Chevrolet Inc.*, 17 P.3d 473, 485 (Or. 2001). But a properly instructed jury here might have awarded far less than that maximum. Accordingly, only a new trial can rectify the constitutional violation. See *White* v. *Ford Motor Co.*, 312 F.3d 998, 1021 (9th Cir. 2002); cf. *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (upon determining that jury had been misinstructed and had therefore predicated verdict on an unconstitutional basis, state court could not simply substitute the maximum penalty that a properly instructed jury "*might* have imposed") (emphasis in original).

[12] See also *Cooper Indus.*, 532 U.S. at 434; *BMW*, 517 U.S. at 562; *Oberg*, 512 U.S. at 420; *TXO Prod. Corp.* v. *Alliance Res. Group*, 509 U.S. 443, 456 (1993) (plurality op.); *Haslip*, 499 U.S. at 21-22.

deeply rooted in our law, going back at least a century. See, *e.g.*, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 111 (1909) ("grossly excessive [civil penalties] amount to a deprivation of property without due process of law"). And the underlying principle "harken[s] back to the Magna Carta." *BMW*, 517 U.S. at 587 (Breyer, J., concurring).

This Court's punitive damages precedents are predicated on "the constitutional importance of legal standards that provide 'reasonable constraints' within which 'discretion is exercised.'" *BMW*, 517 U.S. at 587 (Breyer, J., concurring) (quoting *Haslip*, 499 U.S. at 20-21). These constraints are necessary to ensure "'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit 'appellate review that makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Ibid.* In the absence of such "reasonable constraints," there is "a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection[.]" *Id.* at 596.

The need for such constraints is particularly acute in the area of punitive damages because, "[a]though these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. Moreover, unlike in the criminal context, in which maximum sentences and/or fines for different types of conduct are legislatively determined, in most states punitive awards are open-ended, "leav[ing] the jury with wide discretion in choosing amounts." *Ibid.* Indeed, although juries have little expertise in setting punishment and therefore lack an appropriate frame of reference,[13]

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[13] See, *e.g.*, W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (2001).

jury instructions often provide them with little guidance other than "to do what they think is best." *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

In view of these concerns about the risks of arbitrary and excessive punishment, the Court in *BMW* set forth three guideposts for reviewing punitive awards for excessiveness: the degree of reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and any legislative or administrative penalties for comparable misconduct. 517 U.S. at 574-85; see also *State Farm*, 538 U.S. at 418.

As the Court's opinions in *BMW* and *State Farm* explain, each of these guideposts performs a distinct role in the analysis. The reprehensibility guidepost ensures that the greater wrong receives the more severe punishment. The reasonable-relationship requirement ensures that the punishment is proportionate to the harm caused by the punishable misconduct. And the comparable penalties guidepost, where applicable, helps to enforce the due process notice requirement and to account for legislative and administrative determinations of proper punishment levels for the conduct at issue. See, *e.g.*, *State Farm*, 538 U.S. at 419-28; *BMW*, 517 U.S. at 575-85.

The Oregon Supreme Court jettisoned one of the guideposts – the reasonable-relationship requirement. Acknowledging that "the second *Gore* guidepost is not met" here (Pet. App. 31a), the court nonetheless upheld the massively disproportionate punitive award on the ground that "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio" (*id.* at 33a). Thus, the court effectively held that, where the evidence permits a finding of extreme reprehensibility, the defendant forfeits the right to proportionate punishment.

That proposition fundamentally conflicts with this Court's jurisprudence, which has consistently stressed "the importance of the[] *three* guideposts" in preventing excessive punitive awards. *State Farm*, 538 U.S. at 418 (emphasis added). In particular, this Court has foreclosed the Oregon Supreme Court's notion that the ratio guidepost – and with it, the proportionality requirement – can be disregarded in any case. Each guidepost "must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428. Thus, even where a defendant's conduct is "reprehensible" (*id.* at 419-20) and "merits no praise" (*id.* at 419), the punitive award still must be proportionate both "to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

2. The reasonable-relationship requirement serves critical functions that are not performed by the other two guideposts.

The ratio of punitive to compensatory damages "has a long pedigree" as a factor in gauging excessiveness; it is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *BMW*, 517 U.S. at 580.[14] The reasonable-relationship requirement addresses fundamental interests and concerns that are critical to the excessiveness inquiry, but that are not protected by the other two guideposts.

i. ***Proportionality.*** Although, as discussed above, due process requires that the jury be instructed not to punish for harms to non-parties, that safeguard is not always sufficient protection against verdicts that implicate the concerns discussed in Point I.A.1, *supra*. Post-verdict review provides a

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[14] See also *BMW*, 580 U.S. at 581 (all of this Court's punitive damages decisions have "endorse[d] the proposition that a comparison between the compensatory award and the punitive award is significant").

second indispensable check. *Oberg*, 512 U.S. at 432. And among the three guideposts that courts apply when conducting post-verdict review, only the ratio guidepost helps to ensure that a punitive damages judgment is not excessive as a result of a jury's intention to punish for harms to non-parties.

By ensuring proportionality, the ratio guidepost acts as a firewall on aberrational verdicts by ensuring that each jury is limited to adjudicating the case before it: no single jury is given the power to override defense judgments in other, similar cases by punishing for all injuries arising from a single course of conduct.

ii. ***Objectivity.*** This Court has emphasized the importance of procedures that "'assure the uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Inaus.*, 532 U.S. at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). As the most objective of the three guideposts, the ratio of punitive to compensatory damages is essential to this critical function. Only the ratio guidepost provides a concrete benchmark by which the punishment in a particular case can be compared with punishments in other cases.[15] And only the ratio guidepost ensures that the relationship between the punishment and the harm inflicted falls within a traditionally-accepted range. See, *e.g.*, *State Farm*, 538 U.S. at 425, 427; *BMW*, 517 U.S. at 580-81. If the ratio guidepost could be ignored whenever a jury "could have found" extreme reprehensibility, the constitu-

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[15] See, *e.g.*, Andrew C. W. Lund, *The Road from Nowhere? Punitive Damage Ratios After* BMW *v.* Gore *and* State Farm Mutual Automobile Insurance Co. *v.* Campbell, 20 TOURO L. REV. 943, 973-84 (2005) (discussing the ratio guidepost's role in ensuring "non-arbitrariness"); Mark A. Klugheit, "*Where the Rubber Meets the Road:" Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 833 (2002) ("Whereas reprehensibility is an elusive concept, ratio (at least between actual compensatory and punitive awards) is not.").

tional limitations on punishment would mean little, especially in the very cases – those in which the defendant is unpopular or its conduct is likely to evoke strong emotion – where those restraints are most needed. Cf. *State Farm*, 528 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Although the reprehensibility guidepost also plays a critical role in excessiveness review, it cannot substitute for the ratio guidepost, because the reprehensibility guidepost is inherently subjective.[16] To appreciate the subjective nature of the reprehensibility guidepost, this Court need look no further than the remand proceedings in *State Farm* itself. This Court determined that State Farm's conduct was "reprehensible" (*id.* at 420), but expressly rejected each of the bases for the Utah courts' belief that the conduct was *especially* so (*id.* at 420-24). On remand, however, the Utah Supreme Court concluded that "the blameworthiness of State Farm's behavior toward the Campbells [was] several degrees more offensive than the Supreme Court's less than condemnatory view [of the misconduct]." *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (Utah), cert. denied, 543 U.S. 874 (2004). Accordingly, it rejected this Court's suggestion that a $1 million punishment (a 1:1 ratio) was "at or near" the constitutional maximum, instead setting the punitive dam-

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[16] As Justice Breyer observed in *BMW*, "neither clear legal principles nor fairly obvious historical or community-based standards []defin[e] * * * especially egregious behavior." 517 U.S. at 596. In addition, "little guidance [historically exists] on how to relate culpability to the size of an award." *Id.* at 590 (Breyer, J., concurring); see also Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 WASH. L. REV. 995, 1013 (2001) ("even if various juries were similarly outraged by similar bad acts, we could not expect these juries to transmute their outrage into dollars in a way that ensures similar punishment for similar defendants").

ages at a 9:1 multiple of compensatory damages, which was the highest ratio it believed to be available after this Court's decision. *Id.* at 412.[17]

It is no answer to say that the Oregon Supreme Court purported to restrict the circumstances under which the reasonable-relationship requirement may be "overridden" to instances of "extraordinarily" egregious misconduct. Pet. App. 33a. That is no restriction at all. The lower courts have routinely placed that or a similar label on conduct that barely qualified as punishable.[18]

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[17] *State Farm* is no by means unique in this regard. Since *State Farm*, the lower courts have often reached divergent reprehensibility assessments on analogous facts. For instance, the Ninth Circuit has found the failure to prevent or respond appropriately to discrimination to be especially reprehensible, while several state courts have reached different conclusions. Compare *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003), *Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005), and *Southern Union Co.* v. *Southwest Gas Corp.*, 415 F.3d 1001, 1101 (9th Cir. 2005) ("high punitives" are warranted in cases involving racial, gender, or religious discrimination), with *Gober* v. *Ralphs Grocery Co.*, 137 Cal. App. 4th 204, 219-20 (2006) (discrimination on the basis of gender evinced only a "modest degree of reprehensibility" and did not warrant large punitive award), and *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *10 (Cal. Ct. App. Dec. 3, 2004) (discrimination on the basis of disability was "not highly reprehensible" and did not warrant large award).

[18] See, *e.g.*, *Robbins* v. *Saunders*, 927 So. 2d 777, 779, 791 (Ala. 2005) (majority shareholder engaged in "extremely reprehensible" misconduct when it "oppress[ed]" and "squeeze[d]-out" minority shareholders and failed to pay them funds to which they were entitled); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059 (Alaska 2005) (failure to either deliver jet engine as promised or return the deposit was "extremely reprehensible"); *Spunberg* v. *Columbia/JFK Med. Ctr. Ltd. P'ship*, 1999 WL 1256428, at *9 (Fla. Cir. Ct. May

Like the reprehensibility guidepost, the comparable fines guidepost can have a meaningful role to play "as another measure that restrains the permissible amount" of punitive damages (*Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005)). It is particularly useful for that purpose when (i) the legislatively established penalty is imposed on a regular and predictable basis, and (ii) the conduct at issue in the case is clearly the type of conduct for which the penalty was designed. See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 607-08 (6th Cir. 2006) ($3 million punitive award in automobile design-defect case was excessive in relation to the statutory penalty for selling defective vehicles). While this guidepost may be "objective" on the surface, the Oregon Supreme Court's treatment of it, discussed further below (see pp. 43-44, *infra*), shows how susceptible the inquiry is to manipulation when these circumstances are not present.

iii. ***Deterrence.*** The ratio guidepost also takes into account the extent of the State's interest in punishment and deterrence. As a matter of due process, a punitive award cannot exceed the amount that serves those interests.[19] When compensatory damages are substantial, they already impart substantial deterrence, and when they are nominal or small (for example, in many of the early punitive damages cases), they may well be insufficient to deter. For these reasons, the permissible ratio of punitive to compensatory damages diminishes as compensatory damages increase. See *State Farm*,

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28, 1999) (defendants' tortious interference with business relationship was "extremely egregious and reprehensible").

[19] See *State Farm*, 538 U.S. at 419-20 ("[A] more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and Utah courts should have gone no further."); see also *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

538 U.S. at 425-26.[20] Neither the reprehensibility guidepost nor the comparable penalties analysis takes into account the size of the compensatory damages or other factors – such as whether the defendant has already been subjected to other significant consequences for its conduct – that may reduce (or increase) the need for deterrence.

B. Nothing More Than A Low Single-Digit Multiple Can Satisfy Due Process In This Case.

It is clear that the Oregon Supreme Court erred in disregarding the ratio guidepost and upholding a 97:1 ratio of punitive to compensatory damages. It remains to determine what ratio would be within constitutional bounds.

1. This Court has established a framework in which low-single-digit ratios are the norm.

In *Haslip*, where the compensatory damages were approximately $200,000 and the conduct involved a fraud on a vulnerable victim, the Court observed that a ratio of 4:1 was "close to the line" of constitutionality. 499 U.S. at 23-24. In *TXO Production Corp.* v. *Alliance Resources Group*, 509 U.S. 443 (1993), a plurality of the Court upheld a ratio of punitive damages to potential harm that was "not more than 10 to 1" and likely somewhere in the range of 2.5:1 to 5:1. *BMW*, 517 U.S. at 581 & n.34. In *BMW*, the Court invoked the dozens of early English statutes providing for double, treble, and quadruple damages as evidence of the "long pedigree" of the reasonable-relationship requirement. *Id.* at 580-81. And in *State Farm*, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages * * * will satisfy due process"; reiterated that a punitive award of four times compensatory damages was

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[20] See also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986) ("Punitive damages aside, * * * [d]eterrence * * * operates through the mechanism of damages that are *compensatory*.") (emphasis in original).

likely to "be close to the line of constitutional impropriety"; and indicated that, though it is "not binding," the 700-year-long history of double, treble, and quadruple damages remedies is "instructive." 538 U.S. at 425.

State Farm indicates that a higher multiple may be permissible when (i) "a particularly egregious act has resulted in only a small amount of economic damages"; (ii) "the injury is hard to detect"; or (iii) "the monetary value of non-economic harm might have been difficult to determine." 538 U.S. at 425. At the same time, the Court also identified several factors that drive down the maximum permissible ratio. For example, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. And a lower ratio may be required when the compensatory damages "already contain [a] punitive element," such as damages for emotional distress. *Id.* at 426.[21]

What emerges from *State Farm* is a framework under which the constitutional maximum punishment in any particular case is a function primarily (but not exclusively) of two variables: the amount of compensatory damages and the degree of reprehensibility of the conduct. If the compensatory damages are substantial, the permissible punishment will range from zero to a multiple of four times the compensatory damages. The precise maximum within that range in any particular case would turn on the degree of reprehensibility

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[21] This list is not exclusive. A lower ratio might also be warranted if the defendant is subject to close regulatory oversight or has incurred other financial burdens, such as settlement payments, remediation costs, and awards of attorneys' fees, all of which provide substantial deterrence in their own right. See, *e.g.*, *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (clean-up costs, settlements with non-parties, fines, and restitution all have a deterrent effect).

of the conduct, the existence of truly comparable legislative or administrative penalties, and the extent to which the State's interest in deterrence and punishment may be accomplished through means other than punitive damages. If the compensatory damages are not substantial, a ratio of between 4:1 and 10:1 may be permissible depending on how reprehensible the conduct is determined to be. But only if the compensatory damages are truly small and the conduct is highly egregious is a double-digit ratio constitutionally permissible.

2. This framework is drawn from, and consistent with, historical practice.

The guidance that this Court provided in *State Farm* was drawn from several centuries of Anglo-American legal history, throughout which low-single-digit ratios of punitive to compensatory damages have always been the norm. As this Court signaled in *State Farm*, such multiples should represent the outer limit in most cases today as well.

In reviewing the origins of punitive damages, this Court pointed to "early English statutes authorizing the award of multiple damages for particular wrongs. * * * Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages" – *i.e.*, ratios of 1:1, 2:1, and 3:1. *BMW*, 517 U.S. at 580-581 & n.33 (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 368 & n.23 (1994)); see also 2 Frederick Pollock & Frederic Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 522 (2d ed. 1899) ("under Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to 'the party grieved'").[22]

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[22] As noted in *BMW*, many present-day federal statutes also provide double or treble damages. 517 U.S. at 581 n.33.

Low multiples remained the standard throughout early American history. "Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all." Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOKLYN L. REV. 1003, 1008 (1999).[23] Indeed, in 1915 the Pennsylvania Supreme Court ordered a new trial on punitive damages where the punitive award was 2.7 times the compensatory damages, stating that "[w]e know of no case in our own state where punitive damages were allowed in almost treble the amount of the actual damage sustained." *Rider* v. *York Haven Water & Power Co.*, 95 A. 803, 806 (Pa. 1915).

Similarly, in 1918 West Virginia's highest court struck down a $5,000 punitive award for trespass where actual damages were $557.50, stating that "we cannot allow a [punitive damages] verdict to stand where the amount thereof is so disproportionate to the amount of actual damages, is so out of harmony with the theory upon which punishments are inflicted for like offenses, that it convinces us that the jury were misguided, to say the least, in returning the same." *Pendleton* v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W. Va. 1918). As the court explained:

> Upon this question of the measurement of punitive damages we have some statutes allowing a recovery of double damages or treble damages where a trespass is committed wantonly or maliciously, and

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[23] See, *e.g.*, *Garland* v. *Wholeham*, 26 Iowa 185, 1868 WL 310 (1868) ($1700 in total damages where harm was $1020); *Garland* v. *Wholebau*, 20 Iowa 271, 1866 WL 160 (1866) ($500 compensatory damages; $200 exemplary damages); *Lynd* v. *Picket*, 7 Minn. 184, 1862 WL 1259 (1862) ($267 compensatory damages; $168.59 exemplary damages); *Tifft* v. *Culver*, 3 Hill 180 (N.Y. 1842) ($3.37 compensatory damages; $2.52 exemplary damages); *Wort* v. *Jenkins*, 14 Johns. 352 (N.Y. 1817) ($75 verdict for beating to death a horse worth $50 or $60).

> while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard, and the analogy existing between the damages awarded under such statutes and the damages sought under the claim of punitive damages in cases like this make them a guide which cannot well be disregarded when a verdict of this character is challenged on the ground of excessiveness.

Ibid.[24]

To be sure, courts on occasion did uphold punitive awards that were higher multiples of compensatory damages. Most such decisions, however, fell into one of three categories: (i) the compensatory damages were small (*e.g.*, *White* v. *Metropolitan St. Ry. Co.*, 112 S.W. 278 (Mo. Ct. App. 1908)); (ii) there was uncompensated potential harm to the

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[24] See also *Flannery* v. *Baltimore & O.R.R. Co.*, 15 D.C. 111, 125, 1885 WL 18352 (1885) (9:1 ratio was excessive; remitting award to 2:1); *Buford* v. *Hopewell*, 131 S.W. 502 (Ky. Ct. App. 1910) (ordering new trial where ratio was 2:1); *Hunter* v. *Kansas City Rys.*, 248 S.W. 998, 1002-1003 (Mo. Ct. App. 1923) (5:1 ratio excessive; reducing award to 3:1); *Mitchell* v. *Randal*, 137 A. 171, 172 (Pa. 1927) (citing *Rider* and holding that 5:1 ratio was excessive); *Int'l & G.N.R.. Co.* v. *Telephone & Tel. Co.*, 5 S.W. 517, 518-19 (Tex. 1887) (50:1 ratio was excessive); *Texas Land & Cattle Co.* v. *Nations*, 63 S.W. 915, 916 (Tex. Civ. App. 1901) (9:1 ratio was excessive); *P.J. Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480, 1882 WL 9534 (1882) (12:1 ratio was excessive). See generally Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 530 (1957) ("Many courts have found a way to limit the jury's wide discretion by requiring some 'reasonable relationship' between actual and exemplary damages.'"). We direct the Court to the *amicus curiae* brief of the American Tort Reform Association for additional examples.

plaintiff that far exceeded the plaintiff's actual harm (*e.g.*, *Livesey* v. *Stock*, 281 P. 70 (Cal. 1929)); or (iii) the punitive award represented compensation for forms of non-economic harm that are included in modern compensatory awards. See p. 17, *supra*.[25]

The view that punitive damages generally should be limited to a modest single-digit multiple of the compensatory award persisted through the 19th century and much of the 20th. In fact, as late as the 1960s "punitive damages awards were 'rarely assessed' and usually 'small in amount.'" *TXO*, 509 U.S. at 500 (O'Connor, J., dissenting) (citing Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)). As Professor Owen observed in 1982, even "in serious injury or death cases," "the ratio of punitive to compensatory damages approved on appeal * * * only rarely has exceeded 1.5 or 2:1." David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 48 & n.224 (1982).

Astronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently.[26] Such awards have no basis in common-law history. This trend is self-perpetuating: after reading news story after news story about seven-, eight-, and nine-figure awards, jurors become desensitized to large figures. The system of

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[25] See also Note, *supra*, 70 HARV. L. REV. at 520; 1 Jerome H. Nates et al., DAMAGES IN TORT ACTIONS § 3.01[3][a] (2000)); Colby, *supra*, 87 MINN. L. REV. at 617 & n.119 (2003) (discussing "the compensatory roots of punitive damages" and citing sources).

[26] See W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1412 (2004) (examining punitive awards of over $100 million and concluding that, of the 64 such awards by April 2004, "[j]ust over half * * * [were issued] from 1999 to 2003" with "[m]any of the remainder [from] 1994 to 1998").

awarding punitive damages has broken down, and it routinely results in arbitrary and excessive punishment.

3. Application of the *State Farm* framework in this case mandates that the constitutional maximum is at or near the amount of compensatory damages.

In light of the guidance that this Court provided in *State Farm*, there can be no question that the $79.5 million punitive award is unconstitutionally excessive. Under *State Farm*, there is no justification for a 97:1 ratio when the compensatory damages are not "small" – *even if* the conduct at issue is deemed to be highly reprehensible. The maximum ratio in this case falls within the range that this Court has indicated will be the norm – up to 4:1 – and several factors counsel in favor of a ratio toward the lower end of that range.

As discussed above, when the compensatory damages are "substantial," the maximum permissible ratio is generally 4:1. Here, the $821,485 in compensatory damages are substantial. Indeed, the fact that they exceeded Oregon's cap by $300,000 confirms that.

The next question is where within the applicable range this case falls. For several reasons, the maximum punishment in this case is "at or near the amount of compensatory damages." *State Farm*, 538 U.S. at 429.

First, a substantial punishment is not needed to advance the interests of punishment and deterrence. The promotional activities of tobacco companies have been closely monitored and regulated for years by Congress and the Federal Trade Commission. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000) ("Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965."); *id.* at 144 ("Congress has created a distinct regulatory scheme to address the problem of tobacco and health * * *."); *Lorillard Tobacco Co.* v. *Reilly*,

533 U.S. 525, 541-45 (2001) (describing history of federal regulation of tobacco products); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 513-16 (1992) (same).

Moreover, as the Court is aware, Philip Morris has entered into settlements with all 50 States, including a Master Settlement Agreement ("MSA") with 46 States, including Oregon. These agreements provide for billions of dollars in settlement payments, contain rigorous injunctive and enforcement provisions, and require oversight by the State Attorneys General, including Oregon's. See, *e.g.*, *Reilly*, 533 U.S. at 533 ("In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief."). The combination of federal and state oversight and the terms of the MSA will preclude any repetition of the conduct at issue here.[27] These factors obviate any need for substantial punitive damages to achieve deterrence.

Thus, even accepting for present purposes the Oregon Supreme Court's conclusions that (i) the jury could have found Philip Morris's conduct to be "extraordinarily reprehensible," and (ii) the conduct somehow met Oregon's statutory definition of manslaughter, there is no need for a punitive award at the high end of the zero to 4:1 range.

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[27] The Oregon courts refused to consider the MSA (see *Williams* v. *Philip Morris, Inc.*, 51 P.3d 670 (Or. Ct. App. 2002); *Williams* v. *Philip Morris, Inc.*, 48 P.3d 824, 842-43 (Or. Ct. App. 2002)) and hence blinded themselves to this extraordinarily relevant factor in the excessiveness analysis. See *BMW*, 517 U.S. at 584 (duty of courts in evaluating punitive award for excessiveness is to "consider[] whether less drastic remedies could be expected" "to deter future misconduct").

In fact, however, both of the Oregon Supreme Court's conclusions were deeply flawed. To begin with, although the court concluded that the jury "could have" found high reprehensibility, the jury was not asked to make any such finding, made no such finding, and cannot be presumed to have made such a finding.[28] Indeed, most juries presented with essentially the same allegations, documents, and expert witnesses have returned verdicts for Philip Morris.[29]

Moreover, the Oregon Supreme Court took no account of the context in which Philip Morris's allegedly fraudulent statements were made: an environment saturated for decades with information about the risks of smoking from highly credible sources. The public was inundated by information about smoking and health throughout the time when Jesse Williams smoked. See pp. 1-2, 3 n.1, *supra*; J.A. 57a-59a, 159a-169a, 170a-171a, 172a-175a. See also *FDA*, 529 U.S. at 138, 144-45 (the dangers of smoking have been "well known" and "documented * * * in great detail" for decades). The warnings that have appeared on every pack of cigarettes since 1969 have been deemed by Congress to be "both neces-

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[28] The court's conclusion was the result of a deferential review of the record in which plaintiff was given the benefit of all inferenees that would support a finding of high reprehensibility, while mitigating evidence introduced by Philip Morris was ignored. See, e.g., Pet. App. 2a, 5a-8a, 23a. Although this Court declined to grant review to determine whether the Oregon Supreme Court's sufficiency-of-the-evidence type standard comports with *Cooper Industries* and *State Farm*, the fact that the Oregon court employed such a standard is surely relevant in assessing its finding of high reprehensibility.

[29] In 2003, for example, defense verdicts were returned in 8 out of 10 lawsuits by individual smokers seeking to hold Philip Morris liable for their injuries on theories very similar to that of respondent.

sary and sufficient" to inform the public of the risks of smoking. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 489 n.9 (1996).[30]

Plaintiff's evidence of relevant misconduct must be assessed against this backdrop – a flood of information about the risks of smoking. Of the 14 alleged misrepresentations concerning the link between smoking and cancer that were attributed to Philip Morris, only 7 appeared in media to which Williams might have had access. And plaintiff could offer no evidence that Jesse Williams ever saw or heard *any* statement attributed to Philip Morris. See pp. 2-3, *supra*. Indeed, Williams taught his own children not to smoke. J.A. 140a, 151a-152a. Thus, a fact-finder could well conclude that the alleged fraud had a minimal impact on Williams and was far less reprehensible than the court below hypothesized.

The point, however, is that no one knows how reprehensible the jury believed the misconduct to be, and the Oregon Supreme Court had no basis for upholding the award based on the conclusion that the jury "could have found" extreme reprehensibility. The inference that the jury made such a finding certainly cannot be drawn from the sheer size of the award, given that the jury was invited to impose punishment for the injuries of vast numbers of Oregon smokers. J.A. 197a, 199a. See *Simon* v. *San Paolo U.S. Holding Co.*, 113

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[30] The 1966 warning stated:

> CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH

Congress strengthened these warnings in 1969 and again in 1984, requiring such statements as:

> SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY
>
> QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH.

J.A. 276a-278a.

P.3d 63, 70 (Cal. 2005) (in the absence of a specific finding, to infer one unfavorable to the defendant "from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself").

Second, plaintiff conceded below that "the third *Gore* guidepost [was] of limited value because Oregon provides no civil penalty for private fraud and the criminal homicide statutes on which plaintiff relied in its briefing to the Court of Appeals are not 'truly comparable.'" Plaintiff's Response to Brief on the Merits in the Oregon Supreme Court at 27 (citation omitted). But rather than concluding that the third guidepost either is neutral or cuts against a $79.5 million penalty (see, *e.g.*, *FDIC* v. *Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997); *Groom* v. *Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997)), the Oregon Supreme Court instead speculated that Philip Morris's conduct "would have constituted manslaughter." Pet. App. 27a. The court then proceeded to characterize the penalties for manslaughter as "severe" (*id.* at 29a) – notwithstanding its own recognition that the maximum penalty for a corporation convicted of manslaughter was $50,000 – and concluded that "the third guidepost, like the first, supports a very significant punitive damage award." *Ibid.*

The lower court's rationale proves too much. Every case in which punitive damages are imposed for intentional or reckless conduct that resulted in someone's death (*e.g.*, a substantial number of product-liability cases) could equally be characterized as one in which the conduct amounted to "manslaughter." And, under the logic of the opinion below, every such case would therefore be eligible for an unconstrained and substantially disproportionate ratio of punitive to compensatory damages. Needless to say, no tobacco company has ever been charged with manslaughter or any comparable crime.

The Oregon Supreme Court's invocation of the manslaughter penalty directly contradicted this Court's admonition in *State Farm* that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." 538 U.S. at 428.

To summarize: Even accepting the Oregon Supreme Court's analysis of the reprehensibility and comparable penalties guideposts, the ratio in this case can be no greater than 4:1. And we submit that "a lesser ratio, perhaps only equal to compensatory damages, reach[es] the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 425) in this case for two independent reasons: (i) there is no prospect that the conduct in question will be repeated; and (ii) the Oregon Supreme Court's analysis of the reprehensibility and comparable penalties guideposts is wrong.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick PC
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

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